Supreme Court, U.S.
FILED
MAY 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DAVID E. HUBBLE,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

Charles F. Greevy,III
Attorney for Respondent
Commonwealth of
Pennsylvania

48 W. Third St.
Williamsport, PA 17701
(717) 327-2456

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

COUNTERSTATEMENT OF THE CASE..... 1

SUMMARY OF ARGUMENT..... 13

ARGUMENT

REASONS FOR DENYING THE WRIT

1. Petitioner Was Not In Custody Based Upon Decisions Of The United States Supreme Court And Therefore Miranda Was Not Applicable..... 17

2. The Supreme Court Of Pennsylvania Properly Applied The Requirements Of Edwards v. Arizona..... 25

3. The Pennsylvania Supreme Court Properly Applied The Decision Of This Court In Oregon v. Elstad, And The "Fruit Of The Poisonous Tree" Doctrine..... 38

4. The Decision Of The Pennsylvania Supreme Court In This Case Is Of Little Precedential Effect..... 44

CONCLUSION..... 48

TABLE OF AUTHORITIES

CASES:

California v. Beheler, 463 U.S. 1121, 103 S. Ct. 3517,77L.Ed. 2d 1275(1983)(Per Curiam)..... 20,22

Commonwealth v. Hubble, ___Pa. ____, 504 A.2d 168 (1985)..... 2,18, 23,24 25,27, 29,30, 31,42, 46

Commonwealth v. Hubble, 318 Super. 76, 464 A.2d 1236 (1983)..... 2

Commonwealth v. Mercier, 451 Pa. 211, 302 A. 2d 337(1983)..... 45

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)..... 13,14 16,17, 25,26, 27,28 29,31, 33,35, 36,38, 44,45, 47

Lamp v. Farrier, 763 F. 2d 994 (8th Cir. 1985)..... 34,35

Michigan v. Jackson, ___U.S. ____, 106 S. Ct. 1401 (1986).. 40

Minnesota v. Murphy, 465 U.S. 420, 104 S. Ct. 1136, 79 L.Ed. 2d 409 (1984)..... 19,20

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 15,17, 19,33, 39,40 41,42

Moran v. Burbine, ____U.S. ____, 106 S. Ct. 1135(1986).. 40

Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830,77 L.Ed. 2d 405 (1983)..... 31,32

Oregon v. Elstad, ____U.S. ____, 105 S. Ct. 1285 (1985). 38,39, 40,41, 42,43

Oregon v. Mathieson, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (Per Curiam)... 19,22, 28

Smith v. Illinois, ____U.S. ____, 105 S. Ct. 490 (1984).. 33,35, 36

Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).. 38,41

CONSTITUTIONAL PROVISIONS:

Fifth Amendment to the
United States Constitution.....39

Sixth Amendment to the
United States Constitution.....39

COUNTERSTATEMENT OF THE CASE

On November 11, 1977, following a suppression hearing before the Court of Common Pleas of Lycoming County, a motion to suppress statements made by petitioner herein was denied. Following the petitioners conviction before a jury, an appeal was taken to the Superior Court of Pennsylvania which reversed the petitioner's conviction and granted a new trial on the basis that the motion to suppress should have been granted. Following the grant of the new trial, respondent herein filed a petition for allocatur with the Supreme Court of Pennsylvania. Said petition was granted and by Order of the Supreme Court of Pennsylvania of January 16, 1986 the Superior Court

order was reversed, and the matter remanded to the Superior Court for disposition of the remaining assignments of error. A complete and accurate summary of the facts is contained in the opinions of the Supreme and Superior Courts of Pennsylvania reported at ____Pa. ____, 504 A. 2d 168 and 318 Pa. Super. 76, 464 A. 2d 1236 (1983) and further attached to Hubbles petition as Appendix A and Appendix B. A brief summary of the facts is set forth herein.

On August 5, 1976, Claire Kepner and her two children were robbed and murdered in their Lycoming County home. An extensive investigation ensued which ultimately led the Pennsylvania State Police to suspect petitioner of involvement in the crime. As a result

of the investigation petitioner was interviewed on April 7, 1977, July 6, 1977 and July 8, 1977 along with his wife. Additionally on July 7, 1977, petitioner's wife was interviewed separately. The interview of April 7, 1977 had been telephonically arranged and Hubble was transported to the State Police barracks upon his agreement solely because he himself had no transportation. On July 6, 1977, another meeting occurred at the State Police barracks. This too had been telephonically arranged and again because petitioner had no transportation and upon agreement he was transported to the barracks by the State Police. At the conclusion of this interview, petitioner told the police that his wife might be able to help in the

investigation. In consequence, his wife was telephoned, and agreed to be transported to the barracks for an interview on July 7, 2977, as she too had no transportation.

On July 7, 1977 pursuant to the arrangement made the previous day, the police transported petitioner's wife to the barracks. During this interview, petitioner's wife related to the police information that petitioner had divulged to her concerning petitioner's brother's possible involvement with the crime. Petitioner had not previously related the information. Because both petitioner and his wife were to testify at an unrelated trial of petitioner's brother the following day, arrangements were made to confer with them the following day,

the following day, 8 July, 1977 at the Lycoming County Courthouse, the police interviewed petitioner and his wife, at which time petitioner first related knowledge concerning the offense, as purportedly related to him by his brother.

During the course of the preceding interview, both petitioner and his wife were given Miranda warnings, 348 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and on all occasions waived their rights. Prior to these interviews, petitioner had had involvement in prior unrelated offenses to which he had pled guilty.

As a consequence of the meeting of July 8, 1977, on 11 July, 1977 the police contacted petitioner via telephone and asked if he would be willing to

come in to talk the following day. Petitioner responded he had no transportation and was advised if he wished the police would transport him. Arrangements were then made to pick petitioner up the following day. At the arranged time petitioner asked if his wife could accompany him and was told "sure". Upon arrival of petitioner at the barracks at about 10 A.M., he was advised of and waived his Miranda rights. Petitioner's wife was separately advised of and waived her Miranda rights. Following his waiver of Miranda rights, petitioner was administered a polygraph test and interviewed until shortly before 2 P.M. During this time petitioner was interviewed concerning whether or not he was involved in the crimes, and the

knowledge he had pertaining to other persons including his brother which he had previously related to the police in the interview of 8 July, 1977. At about 2 P.M., petitioner again related what his brother had told him concerning the offense. During this period of time petitioner's wife had constantly been with petitioner and had advised petitioner. Following petitioner relating what his brother had told him, he was asked to relate on tape what he had divulged. At this time petitioner's wife stated to him that she thought he should get an attorney whereupon petitioner stated he wanted a lawyer, followed by "I want a public defender". At that time petitioner was told to call whoever he wanted although the police did not think the

public defender would come out to talk to him as he was not under arrest and was not being accused of a crime. It was then reiterated that petitioner call whoever he wished. Petitioner then requested to call a Mr. Felix who had previously represented him as a public defender. Mr. Felix was no longer associated with the public defender's office although the record is unclear whether that fact was known to petitioner. At that time the police looked up Felix's number for petitioner, whereupon petitioner placed a call to Felix's office. Following a conversation with Felix's secretary, petitioner learned Felix was not present whereupon petitioner stated he wanted to speak to his probation officer, and thereupon dialed his probation

officer and spoke to him. Petitioner was then advised by his probation officer that he too did not believe the public defender would represent a witness at the police station but that petitioner should call and find out. Petitioner then spoke to his wife for a few minutes and was then asked by the police whether or not he wished to give a taped statement. Petitioner then gave a taped statement that was in nowise inculpatory and simply repeated what had been told the police previous. Following this statement the police, after a short conversation with petitioner and his wife, told petitioner they would take him home. At that time they left the interview office, put their coats on and were walking out when petitioner stated

he wanted to talk to his wife. Petitioner and his wife then conferred privately over the next hour and a half. During that time on several occasions the police poked their head in the room and asked what they wanted to do; did they want to talk or go home. Each time additional time was requested. One occasion petitioner was specifically told "If you want to go home, we'll take you home". Finally the police asked if petitioner had been in the home at which time he broke down and confessed. Following his confession he was taken home.

The following day, 13 July, 1977, in consequence of petitioner's statement which implicated not only himself but his brother and another, the others were arrested. Petitioner then spoke

to his probation officer and told him that what he had stated the previous day was a lie. His probation officer then told petitioner to contact the police the next day, July 14, 1977, and tell them he had lied. Rather than wait until the next day, petitioner contacted the police by phone and told them he had lied. Asked if he would make himself available for an interview, petitioner agreed and requested his probation officer be present. The police then proceeded to petitioner's home and transported petitioner and his wife to the barracks as before solely because petitioner had no transportation of his own. Upon arrival at the barracks, the probation officer was already present having been contacted by the police. The police

advised petitioner of an obtained a waiver of his Miranda rights. Petitioner was then asked if he had lied the previous day, and he responded that he had been truthful. He then repeated his confession of the preceding day, and even added facts not previously stated. Following this confession, petitioner was not arrested but transported home. He was finally arrested after the preliminary hearing for his brother and the other individual he implicated.

SUMMARY OF ARGUMENT

The holding of the Pennsylvania Supreme Court does not conflict with the holding in Edwards v. Arizona. Petitioner was never in custody on either July 12, 1977 or July 13, 1977 when his statements to the police were made for he was never formally arrested nor was there such a restraint on his freedom of movement of the degree associated with a formal arrest. On each occasion petitioner voluntarily went to the police station and prior to the time his inculpatory statement was made was in the process of going home, and thereafter he was repeatedly told he would be taken home if he desired.

Because after invoking his right

to counsel, if such were in fact found, petitioner was on his way home and thereafter of his own volition decided to remain at the police barracks since he was not then in custody. Edwards v. Arizona is inapplicable since Edwards applies only to further police initiated custodial interrogation. Moreover, petitioner never invoked his right to counsel, and if he did any further inquiry by the police was simply a routine incident of the custodial relationship if in fact petitioner was in custody. Further, by of his own volition deciding to stay at the police station he initiated further communications, or exchanges with the police, and he initiated further exchange when he subsequently of his own initiative

contacted the police concerning the case.

Because petitioners later statement was voluntarily made, it was admissible because an earlier statement, although technically in violation of Miranda does not require suppression of the later statement. Moreover because there was a clear break in the stream of events when petitioner went home and of his own volition, contacts the police the following day, and in the interim had spoken to his family and his probation officer, the "fruit of the poisonous tree" doctrine does not preclude admission of the later statement.

The decision of the Pennsylvania Supreme Court has little precedential effect, first because the Commonwealth

of Pennsylvania has utilized the test enunicated in Edwards for a period of time prior to the Court's decision in Edwards, therefore the fears of petitioner that Pennsylvania is failing to abide by Edwards are groundless, and secondly because the decision announcing the judgment of the Pennsylvania Supreme Court was not joined by a majority of the Court, therefore it is of little precedential effect in future cases.

ARGUMENT

REASONS FOR DENYING THE WRIT

1. PETITIONER WAS NOT IN CUSTODY BASED UPON DECISIONS OF THE UNITED STATES SUPREME COURT AND THEREFORE MIRANDA WAS NOT APPLICABLE.

It is axiomatic that before a violation of Miranda or Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) precludes the use of a confession, custodial interrogation must have occurred. Instantly only three members of the Pennsylvania Supreme Court found that at the time of petitioner's confession he was undergoing custodial interrogation. And of those three, only one said the issue was not of any doubt. The other two

justices indicated that they may have found no custody but the finding of the lower court of custody was supported by the record. The remaining four justices either explicitly or implicitly found no custody when the confession occurred or found that the court below had not utilized the correct legal standard of determining custody and would have remanded for a determination based on the correct standard. See Commonwealth v. Hubble, ____Pa. ____, 504 A. 2d 168 (1985).

Of those members of the Court who found custody, they simply accepted the finding of the lower court of custody. However, the determination of custody is one of law not of fact based on an application of the facts to the law. Herein even assuming a

majority of the Pennsylvania Supreme Court found custody this legal conclusion is not supported by the facts and is inconsistent with the decisions of this court concerning what constitutes custody.

The rights which emerged from Miranda were designed to protect against "'the overbearing compulsion...caused by isolation of a suspect in police custody'". Minnesota v. Murphy, ____U.S.____, 104 S. Ct. 1136 (1984). And this Court has explicity defined custody to embrace solely a situation involving a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest". Oregon v. Mathieson, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714 (1977)(per curiam). Nor is there

custody simply because questioning occurs in the station house or because the police suspect the person questioned. California v. Beheler, 463 U.S.___ 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983). (Per Curiam)

So viewed petitioner was not the subject of the "overbearing complusion ...caused by isolation of a suspect in police custody". Minnesota v. Murphy, ibid. For in fact petitioner was never isolated but at all times had his wife present and was permitted to speak to her alone. Nor was petitioner arrested or subject to a restraint on his freedom of movement of the degree associated with a formal arrest. Prior to petitioner's non-inculpatory taped statement he had been taken to the barracks by the police solely in

consequence of his not having his own transportation. This meeting at the barracks had been arranged telephonically, the preceding day. Petitioner's wife at all times was present. The interview of July 12, 1977 was no different than any of the previous interviews. If petitioner were not in custody on the prior occasions, why should he be deemed to be in custody on July 12, 1977? Moreover, if petitioner was in custody, was his wife also in custody? Finally just before his non-inculpatory taped interview, petitioner was expressly told he was not arrested and was not being accused of anything. It is submitted that the facts of this case other than that petitioner had been at the station for about four hours prior to his taped non-inculpatory

statement, much of which time had consisted of interviewing his wife, are identical to Oregon v. Mathieson, supra., and California v. Beheler, supra.

Even were petitioner in custody prior to his non-inculpatory taped statement concerning what he had been told by his brother, and what he had previously stated to the police, certainly he was not in custody when his confession occurred. For after his non-inculpatory statement, petitioner was told by the police they would take him home, whereupon all parties after putting on their coats started to walk out the station when petitioner asked to speak to his wife. Petitioner and his wife then spoke alone for one to two hours. During this time the police

constantly asked petitioner if he wanted to go home. Each time petitioner asked for more time. Petitioner was further told that if he wanted to go home, he would be taken. During this time no questions were asked petitioner. Finally he was asked one question, whether he had been in the home, and he broke down and confessed. By no stretch of the imagination can petitioner be found to have been in custody at the point when he made his inculpatory statement.

As stated by Justice Flaherty of the Pennsylvania Supreme Court in concurring:

> "In the present case, the findings of the lower courts notwithstanding, Hubble was not in custody. Police testimony was that just before Hubble gave his inculpatory statement, police

told him, "If you want to go home, we'll take you home." N.T. 125. (Hubble did not own a car.) Hubble himself testified that the police told him that if he made a statement, police would allow him to go home. N.T. 326-327. Moreover, it was only because Hubble and his wife insisted on staying in the state police barracks, as they were on their way out the door to be taken home, that the confession of July 12, 1977 occurred at all. And when Hubble called an advisor (his probation officer) from the police station, the probation officer, testified: "I told him that I wasn't sure whether [the public defender's office] would represent him until he was arrested or not, but I told him to call them to find out." N.T. 251. (Emphasis added). On these facts, it cannot be said that Hubble was in custody. He was being taken home when he insisted on staying in the police facility, where he subsequently gave a confession; just before he gave the confession, police offered to take him home; neither the police nor Hubble's own advisor

> thought that he had been arrested; and Hubble himself testified that after making statement he expected to be taken home." Commonwealth v. Hubble, ____Pa. ____, 504 A. 2d at 179.

Because under previous decisions of this Court, petitioner was not in custody when his confession occurred, his petition for certiorari should be denied.

2. THE SUPREME COURT OF PENNSYLVANIA PROPERLY APPLIED THE REQUIREMENTS OF EDWARDS V. ARIZONA.

Should the court reject the contention of respondent that petitioner was not in custody prior to his nonculpatory taped statement referring solely to what he had been told by his brother, it must be determined if

Edwards v. Arizona, was violated. Edwards does not bar subsequent questioning of an individual after an invocation of Miranda rights but bars only further custodial interrogation. As stated in Edwards:

> "[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right can not be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U.S. at 484, 101 S. Ct. at 1885. (emphasis ours).

Continuing the court stated:

> "The Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation. Absent such interrogation there would have been no infringement

> of the right that Edwards invoked and there would be no occasion to determine whether there had been valid waiver." Id. at 485-86, 1015 S. Ct. at 1885. (emphasis ours)

As stated by Justice Flaherty of the Pennsylvania Supreme Court in a concurring opinion:

> "If Hubble was not in custody at the time of his interrogation, then neither Miranda nor Edwards are applicable and the inculpatory statements were properly admitted into evidence" Commonwealth v. Hubble, ____Pa. ____, 504 A. 2d 168, 179 (1986).

Instantly beyond peradventure, petitioner was not in custody when either his first or subsequent inculpatory statement was given. No formal arrest or restraint of the degree associated with a formal arrest had

occurred. Oregon v. Mathieson, supra. Following his non-inculpatory taped statement concerning solely what his brother had related, and which petitioner had previously related to the police shortly before the taped statement, petitioner and his wife were on there way out of the barracks on their way home when petitioner requested permission to stay and speak with his wife. Over the intervening period prior to his inculpatory statement the police repeatedly asked if he wanted to go home or talk and specifically advised petitioner they would take him home if he wanted. These facts simply can not be equated with a finding of custody. Therefore, even assuming a technical violation of Edwards, when petitioner gave his

non-inculpatory statement reciting what he had already related to the police, because at the time of his inculpatory statement he was not undergoing custodial interrogation, Edwards is simply not applicable.

Assuming arguendo that petitioner was in custody, no Edwards violation occurred. As stated by the Pennsylvania Supreme Court the threshold question of whether petitioner invoked his right to counsel must be determined. Justice Larsen in writing the Pennsylvania Supreme Court opinion stated:

> "[A]ppellee did not invoke his right to counsel. What appellee did request was to call a particular attorney, which he did with Trooper Shimko's assistance, ant to call his probation officer, which he did. While he had full opportunity to do so, appellee did not heed the advise given

him to contact the public defender's office. Commonwealth v. Hubble, ____Pa. ____, 504 A. 2d at 174.

Continuing Justice Larsen stated:

> "Appellee initially requested "a lawyer" or "public defender," but then, after being advised that he could contact the public defender, requested to contact a particular attorney, and then his probation officer. With the possible exception of the erroneous statement about the public defender, which did not in fact mislead either appellee or his wife regarding appellee's right to counsel, Trooper Shimko scrupulously honored appellee's requests and assisted appellee in placing his telephone calls. Appellee did not attempt to contact the public defender's office though advised and given the opportunity to do so. Neither appellee nor his wife subsequently expressed the desire to speak with an attorney. From the foregoing, I would hold that appellee's requests did not pass the threshold level of

> clarity that trigger the Edwards prophylactic rule and that the subsequent conduct of the police officers following appellee's equivocal request demonstrates a good faith, reasonable effort to comply with appellee's desires and to honor his right to counsel. Commonwealth v. Hubble, ____Pa. ____, 504 A. 2d at 175.

Moreover, should the count believe that petitioner invoked his right to counsel, the police did not run afoul of the requirements of Edwards. In Oregon v. Bradshaw, 462 U.S 1039, 103 S. Ct. 2830 (1983) a plurality of this court stated:

> "[T]here are undoubtedly situations where a bare inquirey by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue... [I]nquiries or statements by either an accused or a police officer, relating to routine incidents of the

> custodial relationship will not generally "initiate" a conversation in the sense in which that word was used in Edwards." 103 S. Ct. at 2385.

Instantly the police scrupulously honored petitioner's request after he told them he wanted to talk to an attorney. He was specifically told to call whomever he wanted, and when he requested Mr. Felix, the police looked up the number for him to make the call. When petitioner did not make contact with Felix, the police permitted him to make a phone call. No attempt was made by the police to question petitioner. Only after petitioner was unable to contact an attorney was he asked whether he wanted to give the non-inculpatory statement or not. And when he gave such

non-inculpatory statement he was again advised of his Miranda rights. The purpose of Edwards was so that the authorities through badgering or over-reaching, explicit or subtle, deliberate or intentional would not be able to wear down an accused and persuade him to incriminate himself despite an earlier request for counsel. Smith v. Illinois, ____U.S. ____, 105 S. Ct. 490 (1984). No such badgering occurred here. Petitioners assertion that the police conduct herein was more egregious than in Edward (Petition for certiorari p. 11) is not supported by the record. In Edwards, while the police ceased questioning after the request for counsel, as was done herein, the following morning they went to Edwards cell and when he stated

he didn't want to speak to anyone he was told he had to and he was then removed from his cell. This is a far cry from the situation at hand.

This case is akin to Lamp v. Farrier, 763 F. 2d 994 (8th Cir.)(1985). In Lamp interrogation ceased when the defendant asked to telephone an attorney. After placing the call and hanging up the defendant was asked by the police what happened. The court stated:

> "The fact that the officer asked Lamp after the first phone call 'What happened' does not necessarily mean that the authorities 'initiated' the continuing conversation in the Edwards sense. 'Such inquires or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship will not generally

> initiate ' a conversation in the sense in which that term was used in Edwards'" Id. at 998.

Certainly, herein the police having ceased questioning, and honored petitioners requests were entitled to inquire what petitioner desired without being held to have run afoul of the dictates of Edwards. Simply asking in a routine fashion whether or not petitioner wished to give a statement cannot be equated with a resumption of questioning as condemned by Edwards. (Per Curiam)

Smith v. Illinois, ____U.S. ____, 105 S. Ct. 490 (1984) so heavily relied upon by petitioner is not to the contrary. In Smith police after being told the accused wanted an attorney, did not honor his request but continued

to talk to him and in fact "imparted to the defendant the warning that he had to talk to the interrogation and was seriously misleading". Id. at 495 n. 8. The court in Smith further stated:

> "The interrogation here bore a substantial similarity to the one condemned in Edwards v. Arizona, where the accused after requesting counsel was told that 'he had' to talk to his interrogators...It was precisely such 'badger[ing]' that the Edwards safeguard was designed to prevent." Id. at 495 n. 8.

These factors identified as existing in Edwards and Smith were simply non-existent in the case at bar.

Finally the record demonstrates that petitioner initiated further communications, exchanges, or conversation

with the police. For having given his non-inculpatory taped statement, a reiteration of what he had previously told the police, he was on his way home when he unilaterally requested to remain and speak to his wife. Thereafter his vacillating, ambiguous conduct certainly "initiated" further clarification by the police. This conduct, of his own volition deciding to stay, and despite repeatedly being told he would be taken home if he wished, certainly initiated further communications, exchanges or conversation with the police.

Finally, the following day having been taken home, petitioner's conduct in contacting the police regarding his statements the previous day beyond all question initiated further

communication with the police. Therefore, the July 13, 1977 and its reaffirmation of the July 12, 1977 confession were admissible under Edwards.

3. THE PENNSYLVANIA SUPREME COURT PROPERLY APPLIED THE DECISION OF THIS COURT IN OREGON V. ELSTAD, AND THE "FRUIT OF THE POISONOUS TREE" DOCTRINE.

Were the Court to conclude that an Edwards violation occurred, under the decision of the Court in Oregon v. Elstad, ____U.S. ____, 105 S. Ct. 1285, 84 L. Ed. 222 (1985), or the "fruit of the poisonous tree" doctrine as enunciated in Wong Sun v. United States, 371 U.S 471, 83 S. CT. 407, 9 L. Ed. 2d 441 (1963) petitioner

is not entitled to relief. Instantly as Oregon v. Elstad makes clear a statement obtained in violation of Miranda does not require suppression of a later statement as a "fruit of the poisonous tree" as that doctrine assumes the existence of a constitutional violation. And a violation of Miranda is not a violation of the Fifth Amendment as the "Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony". Id. at ____, 105 S. Ct. at 1292. Further, a Miranda violation does not constitute coercion... Id. at 1292 n. 1. Petitioner seeks to avoid application of Elstad by arguing that his Sixth Amendment right to counsel was violated. (Petition

for Certiorari p. 28). However, the Sixth Amendment right to counsel attaches only at or after the first formal charging proceeding, and the Fifth Amendment does not provide such a right. Moran v. Burbine, ____U.S.____, 106 S. Ct. 1135 (1986). But Cf. Michigan v. Jackson, ____U.S. ____, 106 S. Ct. 1404 (1986).

In Elstad the court concluded that the fruit of the poisonous tree doctrine had no application to a Miranda violation. "There is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made."

Oregon v. Elstad, ____U.S.____, 105 S. Ct. 1289, 1298 (1985). Instantly petitioner does not contend there was any coercion in regard to any of his statements. Therefore, his later statement though technically in violation of Miranda was admissible.

Should the Court believe because instantly the initial statement was given not in regard to unwarned questioning but after a request for counsel, that Oregon v. Elstad is inapplicable, then the court must determine whether under Wong Sun v. United States, supra, the latter statement was admissible. It should be noted that the Pennsylvania Supreme Court found that exclusion of the latter statement of July 13, 1977 was not required because of this Court's

decision in Elstad and because the taint of any illegality was dissipated. Commonwealth v. Hubble, ____Pa. ____, 504 A. 2d 168, 177 (1986).

It is submitted that the finding of dissipation is supported by the evidence. Instantly having returned home after his confession, and having called the police the following day, and having voluntarily decided to again come in contact with the police, and having been properly advised of his Miranda rights there was a clear break in the stream of events. In his dissent in Elstad, Justice Marshall identifies various factors that indicate that the taint has been dissipated. One of these factors is that the later statement is removed in time and place from the

earlier statement so that the accused is fully able to exercise his independent judgment in deciding whether to again speak. Oregon v. Elstad, ____U.S.____, 105 S. CT. at 1309. Instantly while the later statement was not removed in place it was certainly removed in time, and the petitioner of his own accord chose to comtact the police. This certainly demonstrates a "break in the stream of events". Another factor is the presence of intervening factors such as consultations with family members, or an independent decision to speak so that an accused's late confession could not be attributed to the earlier one. Id. at 1310. Herein, petitioner had the opportunity to consult at home with family members, his probation

officer, and he independently contacted the police. Another factor to consider is the purpose and flagrancy of the misconduct. Id. at 1310. It can not seriously be contended that the police conduct in this case was flagrant and purposeful.

4. THE DECISION OF THE PENNSYLVANIA SUPREME COURT IN THIS CASE IS OF LITTLE PRECEDENTIAL EFFECT.

Petitioner asserts, "If this decision of the Supreme Court of Pennsylvania is permitted to stand, Edwards will be a nullity in the Commonwealth of Pennsylvania, and Pennsylvania law enforcement officers will be encouraged to continue custodial interrogation after the accused

has asserted the right to speak to counsel". (Petition for Certiorari p. 11). This statement of petitioner is completely at odds with the law of the Commonwealth of Pennsylvania as it has existed since 1973. For in 1973, eight years before this Court's decision in Edwards, the Pennsylvania Supreme Court held that once an individual asserted his right to counsel for a later "waiver to be effective, the reversal of the defendant's position must have been initiated by him". Commonwealth v. Mercier, 451 Pa. 211, 302 A. 2d 337, 340 (1973).

Moreover, were the decision of the Pennsylvania Supreme Court in this case to stand, it would have little or no impact on future cases

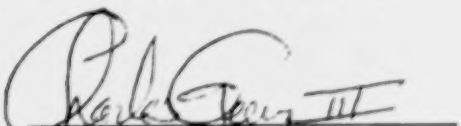
decided in the Commonwealth of Pennsylvania. Instantly, three separate opinions were filed, none of which commanded a majority of the Pennsylvania Supreme Court, upholding the conduct of the police in this case. See Opinions of Justice Larsen joined by Justice Papadakos, ____Pa.____, 504 A. 2d 169-178, Justice McDermott, ____Pa.____, 504 A. 2d 178, and Justice Flaherty, ____Pa. ____, 504 A. 2d at 178-180. And of the other three members of the court, Justice Nix and Justice Hutchinson clearly indicated that following a remand to the lower court they too might upnold the decision of the Court on grounds other than Edwards. See Opinion of Justice Nix, ____Pa.____, 504 A. 2d at 180 and Justice Hutchinson, ____Pa.____,

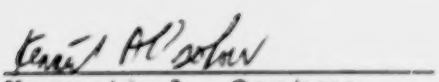
504 A. 2d at 180-185. Therefore, since no one opinion commanded a majority of the Court and because the decision reversing the Superior Court was not dependent upon an interpretation of Edwards v. Arizona, the petition for certiorari should be denied.

CONCLUSION

Wherefore, Respondent, requests Your Honorable Court to deny the Petition for Writ of Certiotari in the case at bar.

Respectfully submitted,

BY: 
Charles Greevy, III

BY: 
Kenneth A. Osokow

District Attorney's Office
48 W. Third St.
Williamsport, PA 17701
(717) 327-2456

CERTIFICATE OF SERVICE

I, CHARLES GREEVY,III, ESQUIRE, attorney for Respondent Commonwealth of Pennsylvania, hereby certify that three (3) copies of Respondent's Brief in Opposition of Petition for Writ of Certiorari was served upon Robert Elion, Esquire, 125 East Third Street, Williamsport, Pennsylvania on Tuesday, May 27, 1986 by personal service.

Charles Greevy, III
Respondent for
Commonwealth of
Pennsylvania